SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-838

FREDERICK PARKER FORD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
ARGUMENT	6
CONCLUSION	20

TABLE OF AUTHORITIES

Cases:

Brinegar v. United States, 338 U.S. 160 (1949) 7

Cady v. Dombrowski, 413 U.S. 433, 441-42 (1973) . . . 11, 12

Carroll v. United States, 267 U.S. 132, 153 (1925) 7

Chambers v. Maroney, 399 U.S. 42 (1970) 8, 10

Chimel v. California, 395 U.S. 752, 762-63 (1969) 12, 14

Coolidge v. New Hampshire, 403 U.S. 443, 461 (1971) 7, 9, 11

Cooper v. California, 386 U.S. 58, 17 L.Ed. 2d 730 (1967) 8, 12

Dell v. Louisiana, 468 F.2d 324, 327 (CA 5 1972) 7

Harris v. United States, 390 U.S. 234 (1968) 12

Jones v. United States, 357 U.S. 493, 499 (1958) 6

Katz v. United States, 389 U.S. 347, 357 (1967) 6

Leary v. United States, 395 U.S. 6, 50 (1969) 16

McBoyle v. United States, 283 U.S. 25, 27 (1931) 18

McDonald v. United States, 335 U.S. 451, 456 (1948) 6

Preston v. United States, 376 U.S. 364 (1964) 7, 8

Page

United States v. Bradshaw, 490 F.2d 1097 (CA 4 1974), cert. den. 43 LW 3239 10

United States v. Free, 437 F. ed 631, 633-34 (D.C.Cir. 1970) 12

United States v. Gaines, 489 F.2d 690 (CA 5 1974) ... 15, 19

United States v. Jeffers, 342 U.S. 48, 51 (1951) 7

United States v. Jones, 475 F.2d 723, 727-28 (CA 5 1973) 12

United States v. Maze, ____ U.S. ____ 19

United States v. Moore, 446 F.2d 448 (CA 3 1971) .15, 16, 19

United States v. Payne, 429 F.2d 169, 171-72 (CA 9 1970) 11

United States v. Rothberg, 480 F.2d 534 (CA 2 1973) 15, 16, 17, 19

United States v. Soriano, 497 F.2d 147 (CA 5 1974 *en banc*) 9

United States v. Wiltberg, 5 Wheat. 76, 95-96 [5 L.Ed. 37] (1820) 18

Statutes:

Title 21 USC §802 (15) 3, 18

Title 21 USC §812 (c)(c)(10) 3

Title 21 USC §841 (a)(1) 2, 3

Title 26 USC §4761(2) 16

Title 28 USC §1254(1) 2

United States Constitution, Amendment IV 2

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OPINIONS BELOW

The District Court and the Court of Appeals below entered judgment against petitioner without rendering a formal opinion.

JURISDICTION

Petitioner invokes the jurisdiction of the Supreme Court of the United States pursuant to Title 28, United States Code, Section 1254(1). The judgment of the United States Court of Appeals for the Fifth Circuit was made and entered on December 6, 1974.

QUESTIONS PRESENTED

1. Is the warrantless search of a motor vehicle conducted with probable cause invariably reasonable within the meaning of the Fourth Amendment irrespective of the opportunity to secure a search warrant?

2. Can a defendant charged with possession of marihuana with intent to distribute in violation of Title 21, United States Code, Section 841(a)(1) be denied the opportunity to present evidence that there is more than one species of *Cannabis* and that the *Cannabis* introduced against defendant could not be distinguished as to species?

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Amendment IV:

> "The right of the people to be secure in their persons. . .and effects, against unreasonable searches and seizures, shall not be violated . . ."

Title 21, United States Code, Section 841(a)(1):

". . . .it shall be unlawful for any person knowingly or intentionally–to. . . .possess with intent to. . . distribute. . .a controlled substance.

Title 21, United States Code, Section 812(c)(c)(10)–lists marihuana as a controlled substance.

Title 21, United States Code, Section 802(15):

"The term 'marihuana' means all parts of the plant Cannabis Sativa L., whether growing or not; . . . . "

STATEMENT OF THE CASE

Frederick Parker Ford was indicted for possession of marihuana with intent to distribute in violation of Title 21, United States Code, Section 841(a)(1). Prior to trial, a motion to suppress the seized marihuana was heard and denied. A jury trial followed, during which Ford offered to establish by expert testimony that more than one species of marihuana exists and that marihuana introduced against defendant could not be distinguished as to species, which offer of proof was rejected by the trial judge. The jury returned a verdict of guilty. Upon said verdict judgment was entered sentencing Ford to imprisonment for a term of four years. On appeal to the Fifth Circuit the judgment was affirmed without opinion.

The petitioner was convicted on evidence showing that 197 burlap sacks containing in excess of 10,000 pounds of marihuana were contained within a truck Ford had been driving. On February 14, 1974, Officer Raymond E. Shuck of the Homestead, Florida Police Department was summoned at about 2:00 a.m. to the

scene of an accident at the Holiday Inn in Homestead. Upon arrival at the Holiday Inn, Officer Shuck observed gouges and scratches on the canopy of the Holiday Inn. He also observed damage to a white truck parked across the street. The truck had apparently scraped the canopy of the Holiday Inn entrance.

Officer Shuck began to prepare an accident report. Present and being questioned about the accident were defendant Ford and the innkeeper. Shortly thereafter Officer Clinton Terry arrived to offer assistance. Officer Shuck requested Terry to check out the truck parked across the street for possible damage. Upon arrival at the parked truck, Terry pulled his police vehicle alongside the front of the right side of the truck. Terry testified he stood on the hood of his vehicle to observe the damage to the top of the truck. Officer Terry observed that the metal top of the truck was torn back eight to ten feet from the top. He also observed a couple of burlap sacks, one of which was protruding through the hole in the top of the truck.

At this point Officer Shuck arrived at the truck in his vehicle. He likewise climbed on top of the police vehicle. Terry inquired as to the contents of the truck and Shuck stated that Ford had told him he was hauling furniture. Officers Terry and Shuck both noted a strong odor when standing on the police vehicle. (Terry: "I observed a strong odor or some type of organic substance, like wet grass or weed of some sort." Shuck: "It reaked.")

Officer Terry also testified that he reached in and felt a bag and could tell that it was some type of grass within the bag. He likewise shined his flashlight within the truck. Officer Shuck stated that he saw large burlap

bags with plastic around them to a depth of 5½ to 6 feet. After making this observation Shuck jumped off the vehicle. He observed Mr. Ford "walking in a rapid manner in sort of the other direction." Shuck directed Ford to return to the truck which Ford did.

As Ford walked to where Shuck was standing, Officer Terry asked him what he was hauling in the truck. Ford, according to Terry and Shuck, stated: "marihuana". Officer Shuck placed Ford under arrest, directed him to the rear seat of the police vehicle and advised Ford of his rights.

Shuck asked Ford if he had a key to the truck and following an affirmative answer asked for the key which Ford gave him.

With the key the officers opened the rear door of the truck. Officers Terry and Shuck each opened one package with the aid of a knife. Marihuana was removed from one of the bags and lit for purpose of observing the odor.

Based on the foregoing, the trial Court ruled that the search of the truck was valid as "based upon an arrest incident to an arrest with probable cause" and that probable cause existed for a "full and complete search."

ARGUMENT

I.

THE WARRANTLESS SEARCH AND SEIZURE OF MARIJUANA FROM THE TRUCK WAS IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION. ACCORDINGLY, THE COURTS BELOW ERRED IN FAILING TO SUPPRESS SAME FROM EVIDENCE UPON TIMELY MOTION OF FORD.

A. There exists a substantial conflict in the Circuits as to whether the warrantless search and seizure of contraband from a motor vehicle conducted with probable cause is invariably reasonable within the meaning of the Fourth Amendment irrespective of the opportunity to secure a warrant.

In construing the demand of "reasonableness" set forth in the Fourth Amendment, the Supreme Court has established as its basic constitutional rule that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). The exceptions are "jealously and carefully drawn," *Jones v. United States*, 357 U.S. 493, 499, (1958), and "there must be a showing by those who seek exemptions. . .that the exigencies of the situation made that course imperative." *McDonald v. United States*, 335 U.S. 451, 456 (1948). "[T]he

burden is on those seeking the exemption to show the need for it." *United States v. Jeffers*, 342 U.S. 48, 51, (1951).

One such "exigent circumstance" that has developed to the general requirement of search warrants concern the search of motor vehicles under certain circumstances. However, it is equally clear that "(t)he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Coolidge v. New Hampshire*, 403 U.S. 443, 461 (1971). "[T]he warrantless seizure of items from a car should not be mechanically tolerated simply because a car is involved." *Dell v. Louisiana*, 468 F.2d 324, 327 (CA 5 1972).

Two general theories have developed in justification of certain warrantless vehicle searches. First is the notion that because of the mobility of motor vehicles, assuming the existence of probable cause, automobiles and other vehicles may be searched without warrants "when it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Carroll v. United States*, 267 U.S. 132, 153, (1925). This principle has been reaffirmed on many occasions. See, e.g., *Brinegar v. United States*, 338 U.S. 160 (1949).

However, application of this principle has proved difficult often leading to seemingly contradictory results. Of special concern has been the factual situation where the vehicle has been secured and the threat of its removal from the jurisdiction or the destruction of evidence abated. For example, in *Preston v. United States*, 376 U.S. 364 (1964), a motor vehicle was

searched after the defendants had been arrested and taken to police headquarters and the car removed to a garage. A unanimous Court found the search unreasonable under the Fourth Amendment. As noted by Mr. Justice Black:

> "At [the time of the search] there was no danger that any of the men arrested could have used any weapons in the car or could have destroyed any evidence of a crime–. . .nor, since the men were under arrest at the police station and the car was in police custody at a garage, was there any danger that the car would be moved out of the locality or jurisdiction." 376 U.S. at 368.

However, in *Cooper v. California*, 386 U.S. 58 (1967), a sharply divided Court upheld a search of a motor vehicle *one week* after its seizure by law enforcement officials for use as evidence in a forfeiture proceeding. The dissenters argued that this case "is on all fours with *Preston*." The dissenters thought that *Cooper* had the effect of overruling *Preston sub silentio*. 386 U.S. at 65.

In *Chambers v. Maroney*, 399 U.S. 42, (1970), the Supreme Court was faced with a warrantless search of a motor vehicle made at a police station some time after the arrest and after seizure of the motor vehicle by law enforcement authorities. In sustaining the validity of the warrantless search of the motor vehicle, Mr. Justice White noted:

> "For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable

under the Fourteenth Amendment." 399 U.S. at 52.

Then again in *Coolidge v. New Hampshire*, the Court held a warrantless seizure of a suspect's automobile parked in the driveway and its subsequent search at the police station to be unreasonable. The Court noted that under *Carroll* and its progeny warrantless searches of motor powered vehicles for contraband had been sustained where *it is not practicable to secure a warrant.* 403 U.S. at 459-60 (emphasis in original). However, the Court continued:

> "And surely there is nothing in this case to invoke the meaning and purpose of the rule of *Carroll v. United States*—no alerted criminal test or flight, no fleeting opportunity on an open highway after a hazardous chase, no contraband or stolen goods or weapons, no confederates waiting to move the evidence, not even the inconvenience of a special detail to guard the immobolized automobile. In short, by no stretch of the legal imagination can this be made into a case where 'it is not practicable to secure a warrant', . . .and the 'automobile exuption', despite its label, is simply irrelevant." 403 U.S. at 462.

The question thus naturally arises, given probable cause, is a warrantless search of a motor vehicle invariably valid? The Fifth and Fourth Circuits have reached conflicting viewpoints on the question. In *United States v. Soriano*, 497 F.2d 147 (CA 5 1974 *en banc*), rev'ing in part 482 F.2d 469, Government agents had probable cause to believe that suitcases in a trunk of a taxicab contained contraband. In addressing the question of the warrantless search that ensued, the Fifth Circuit held:

"As a matter of pattern of logic much can be said for the panel's view that, however they begin, whenever matters come to so stable a stand that a warrant can be obtained, one should be. The view is buttressed, moreover, by the practical need to control overzealous police action. The question is whether the alternate course pursued here was fatal. Under *Chambers v. Maroney*, ... it was not." 497 F.2d at 149.

But, a recent decision of the Fourth Circuit, *United States v. Bradshaw*, 490 F.2d 1097 (CA 4 1974), cert. den. 43 LW 3239, takes the opposite tact. In *Bradshaw*, the Court indicated it had "no doubt that, at the points at which [the] Agent. . .smelled the distinctive odor of moonshine whiskey emanating from the truck, he had probable cause to believe that the truck contained contraband. Taken together with defendant's known reputation as a moonshiner, and the presence at the scene moments earlier of two individuals in a vehicle carrying one of the raw materials of a distilling operation, [the] Agent's detection of the odor of moonshine amounted to probable cause for the belief that moonshine was to be found in the truck." 490 F.2d at 1101-02.

The Fourth Circuit after a careful review of recent Supreme Court rulings found the warrantless search defective. Noting that the only "fair reading of the *Carroll-Chambers-Coolidge* line of cases" is that "the scope of the automobile exception [is] carefully defined to require the presence of circumstances indicating the risk of loss of evidence, 470 F.2d at 1103, the Court concluded the search to be invalid because "two of the agents could have guarded the truck smelling of moonshine whiskey while the third

obtained a warrant without significant risk of loss of evidence." *Id.* at 1103-04. See also, *United States v. Payne*, 429 F.2d 169, 171-72 (CA 9, 1970).

The facts in this case present an excellent vehicle to resolve this conflict of authority if this Court should so choose. The search of the truck Ford was driving was conducted *with* probable cause and without a warrant. Ford was under arrest and his vehicle under police control. As in *Coolidge v. New Hampshire, supra*, there was "no alerted criminal bent on flight, no fleeting opportunity on an open highway after a hazardous chase. . .[and] no confederates waiting to move the evidence." 403 U.S. at 580. In short, the contours of *Chambers* and *Coolidge* can be sharply defined by resolution of the conflicts currently existing between the Fifth and Fourth Circuits.

A second permissible form of a warrantless search of a motor vehicle was discussed by Mr. Justice Rehnquist in the recent decision of *Cady v. Dombrowski*, 413 U.S. 433, 441-42, (1973).

> "Because of the extensive regulations of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office. Some such contacts will occur because the officer may believe the operator has violated a criminal statute, but many more will not be of that nature. Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking function, totally divorced

> from the detection, investigation or acquisition of evidence relating to the violation of a criminal statute."

Thus, warrantless searches of motor vehicles can be sustained in which the possibilities of the vehicles being removed or evidence in it being destroyed are remote, if not nonexistant, provided that the search is a "caretaking function, totally divorced from the detection, investigation or acquisition of evidence relating to the violation of a criminal statute." See *Harris v. United States*, 390 U.S. 234, (1968), (search was pursuant to police regulation to protect the car while in police custody); *Cady v. Dombrowski, supra*, (search designed to protect against a gun thought to be in vehicle from being removed by vandals).

This Cady rationale for the warrantless search of a motor vehicle–the caretaking police function–is clearly absent. The record is clear that at the point Officers Terry and Shuck unlocked the back of the truck and ripped open two of the burlap bags, they were engaged in a definite search for marijuana.

In *Cady* the majority made clear that those cases of warrantless searches of motor vehicles falling within the caretaking police function rationale did not involve the search for incriminating evidence. Whether the intrusion to be safeguard the owner's property, *Harris v. United States, supra,* or to guarantee the safety of the custodians, *Cooper v. California*, 386 U.S. 58, 17 L. Ed.2d 730 (1967), or to safeguard the public which might be endangered if an intruder removed a revolver from a vehicle, *Cady v. Dombrowski, supra,* the officers were engaged in activity unrelated to the discovery of criminal violations. They were performing reasonable

police protective functions during which they came in contact with the incriminating evidence.

B. The search of the truck at a time and place where Ford could neither constitute a threat to the personal safety of the arresting officers nor possibly engage in destruction of evidence cannot be justified as incident to a valid arrest.

A specific exception to the warrant requirement in conducting a search is that a search may be made incident to a valid arrest. The rationale and limits of this exception are delineated in *Chimel v. California*, 395 U.S. 752, 762-63, (1969).

> "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek in order to resist arrest or effect his escape... In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must...be governed by a like rule... There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area within which he might gain possession of a weapon or destructable evidence."

Of course, each case must in the final analysis rest upon its own facts. The search that occurred "incident" to the arrest of Ford in this case can be justified only as being an area from which Ford might secure

possession of a weapon or destructible evidence as the case does not present issues involving the search of his person. At the time of the search, Ford was secured in a police vehicle with no realistic access to the truck wherein the search occurred. Denied physical access to the truck, the search of the truck simply cannot be incident to the arrest of Ford. See *United States v. Jones*, 475 F.2d 723, 727-28, (CA 5 1973).

It is difficult to conceive the circumstances which would permit reasonable apprehension that Ford might secure a weapon or destroy evidence in a truck while seated in a different vehicle. It is somewhat farfetched to imagine a mad dash to the truck from the rear of the police vehicle. But, c.f. *United States v. Free*, 437 F.2d 631, 633-34 (D. C. Cir. 1970).

Even more persuasive are the facts surrounding the search itself. Nothing in the record indicates that the search of the truck was to secure possible weapons that could be used to effect an escape or endanger the officers. Nor is there any valid indication, nor could there be, that the officers feared the destruction of in excess of *10,000 pounds* of marihuana. Rather, the search was of an exploratory nature to secure incriminating evidence and was not conceived with the rationale that justifies warrantless searches incident to valid arrests.

The search of the truck extending beyond the area from which Ford could have gained a weapon or something that might have been used as evidence against him was, therefore, *unreasonable* with the meaning of the Fourth Amendment and cannot be justified as incident to the arrest of Ford. *Chimel v. California, supra*, 395 U.S. at 768.

II.

IT WAS ERROR FOR THE TRIAL COURT TO REFUSE TO PERMIT EXPERT TESTIMONY AS TO THE EXISTENCE OF MORE THAN ONE SPECIES OF CANNABIS.

Frederick Ford offered to prove, through the testimony of an expert witness that more than one species of Cannabis exists and that the Cannabis admitted into evidence could not be distinguished as to what species it was. The offer of proof was rejected on the authority of *United States v. Gaines*, 489 F.2d 690 (CA 5 1974).

In *Gaines*, the defendant objected on appeal to the failure of the trial court to instruct the jury as to the statutory definition of marihuana. There was evidence in the record, from the Government's chemist, that there are three species of marihuana; *Cannabis sativa L., Cannabis indica and Cannabis ruderalis*; and that the chemist was unable to distinguish between the three. Since only Cannabis sativa L. is expressly outlawed by the Federal Controlled Substances Act, 21 USCA § 812(10), 21 USCA § 802(15), it was argued that the Government had not proved beyond a reasonable doubt that the seized contraband was covered by the statute. This Court found that the arguments in *United States v. Moore*, 446 F.2d 448 (CA 3 1971) and *United States v. Rothberg*, 480 F.2d 534 (CA 2 1973) were persuasive and that no error occurred by the failure to instruct on the statutory definition.

The applicant seeks to have this Court review the findings of *Gaines, Moore* and *Rothberg* and respectfully suggests that reliance upon these decisions is not well placed.

In *United States v. Moore*, 446 F.2d 448 (3rd Cir. 1971), the defense contended that because the Government's chemist could not distinguish *Cannabis sativa L.* from *Cannabis indica* that the Government had failed to meet its burden of proving that the substance was marihuana, since only *Cannabis sativa L.* was mentioned in the statutory definition. 26 USCA § 4761(2). The Court concluded that the Government had met its burden because there is only one species of marihuana and that is *Cannabis sativa L.*

In support of the conclusion that there is only one species of marihuana, the Court cited *Leary v. United States*, 395 U.S. 6, 50, (1969). In *Leary*, while discussing the validity of the presumption of knowledge of importation, the Court stated the following dictum:

> "As for appearance, it seems that there is only one species of marihuana, and that even experts are unable to tell by eye where a particular sample was grown. (footnote 106. See, 1 Transcript 16-18, 54.) (Testimony of Dr. Richard Schultes, Director of Harvard Botanic Museum)."

Whatever probative weight this dictum of the Court might have would appear to rest on this acceptance of the opinion of Dr. Schultes. The testimony proferred in the trial of Mr. Ford would tend to contradict this conclusion that there is only one species and would suggest that Dr. Schultes has revised his opinion. At the very least, the question becomes one of competing expert evidence and cannot be disposed of as a matter of law.

In *Rothberg v. United States*, 480 F.2d 534 (1973), it is suggested that although there is a growing botanical opinion that a distinction can be made between

Cannabis sativa L. and *Cannabis indica*, that at the time of the offense there was general agreement that only one species existed. " . . . there is no question but that the lawmakers, the general public and overwhelming scientific opinion considered that there was only one species of marijuana so that this Afghan hemp was included within the statutory definition." *Ibid*, at 536.

Applicant urges that careful examination of the full state of scientific opinion at the applicable times will demonstrate beyond cavil that the *Rothberg* Court was rather sanguine when it concluded that there was, in 1937, a consensus among experts as to the properties of the Cannabis plant. The *Rothberg* court was likewise wildly optimistic when it determined that "*Cannabis sativa L.*" was a "phrase whose meaning was clearly understood by Congress at the time of the enactment [of the Marijuana Tax Act of 1937]." *Rothberg, supra*, 351 F. Supp. at 1118.

The question here is not whether this choice of statutory language was provident; rather, the issue is simply whether the Congress knew when it enacted the Federal Controlled Substances Act in 1970, that there was a dispute in the scientific community on the issue of whether Cannabis was polytypic. If certiorari is allowed applicant will present strong evidence that the Congress was indeed well aware of that dispute. Armed with this awareness, it was easily within the power of Congress to draft a statute sufficiently broad to include all species of Cannabis. No great imagination would have been required to accomplish this legislative objective. Indeed, the United States is a signatory of the Single Convention on Narcotic Drugs, 18 U.S.T. 1407 (1967), which provides that "Cannabis plant

means any plant of the genus cannabis," *Id.* at 1409, and thus eliminates the ambiguity which plagues 21 USCA § 802 (15).

Legislative omissions in criminal statutes can only be remedied by legislative action. In our tripartite scheme of government, courts are not permitted to effectuate what appears to be the legislature's intent by extending the reach of a penal statute beyond its plain language. This fundamental principle has never been better expressed than by Chief Justice Marshall in *United States v. Wiltberger*, 5 Wheat. 76, 95-96 [5 L.Ed. 37] (1820):

> "The rule that penal laws are to be construed strictly, is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. ***To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those with are enumerated."

In *McBoyle v. United States*, 283 U.S. 25, 27 (1931), Justice Holmes noted the connection between the principles enunciated in Wiltberg and the constitutional requirement that penal statutes be drafted with specificity:

> "Although it is not likely that a criminal will carefully consider the text of the law before he

> murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. ***[Therefore criminal statutes] should not be extended . . . simply because it may seem to us that a similar policy applies, or upon the speculation that, if the legislature had thought of it, very likely broader words would have been used."

These principles have been most recently reaffirmed in *United States v. Maze*, ____ U.S. ____.

Similarly, any widening of the ambit of the Federal Controlled Substances Act must be done by Congress, and not by the courts. It would be an unduly simplistic course for the judiciary to emulate the *Rothberg* and *Moore* courts and expand the sweep of 21 USCA 841 to reach possession of substances not clearly and plainly criminalized by the statute. But the temptation to sidestep the rule that criminal statutes are to be strictly construed must be firmly resisted, even in those instances where the legislature most probably intended to proscribe certain conduct but failed to do so because of inartful draftsmanship. When problems of this sort are confronted by the courts, the proper and constitutional course is to resist engrafting additional prohibitions onto the statute, adopt an appropriate strict construction, and, thereafter leave it to the legislature to mend its own product in whatever manner it chooses. Accordingly, this Court should set aside the ill advised holdings of *Gaines, Moore* and *Rothberg*.

Ford contends that the essence of the dispute over whether there is one or more than one species of

Cannabis is a technical and scientific matter which cannot be resolved simply by a legal conclusion. It is a question of fact within the proper province of the jury and the testimony should have been permitted to reach the jury to have the issue resolved by them. The failure to permit this offer of proof of different species into evidence mandates that the conviction be reversed.

CONCLUSION

For the foregoing reasons, applicant, Frederick Parker Ford, prays that his petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit be allowed.

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari have been forwarded to the respondent, via U.S. Airmail, postage prepaid and properly addressed as shown:

Mr. Donald L. Ferguson
Assistant United States Attorney
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14 N.E. First Avenue
Miami, Florida 33132

This the ____ day of January, 1975.

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-838

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TABLE OF CONTENTS

Page

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT 1a

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW 2a

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-2779
Summary Calendar* DO NOT PUBLISH

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FREDERICK PARKER FORD,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

(December 6, 1974)

Before GEWIN, GODBOLD and CLARK, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

[1]See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

United States Court of Appeals
Fifth Circuit

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600 Camp Street
New Orleans, La. 70130

December 6, 1974

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW
No. 74-2779 U.S.A. V. FORD

Dear Counsel:

Enclosed is a copy of the Court's opinion this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41 of the Federal Rules of Appellate Procedure govern costs, petitions for rehearing and mandates, respectively. Local Rule 15 has been amended to provide: "A motion for a stay of the issuance of a mandate in a *direct criminal appeal* filed under F.R.A.P. Rule 41 shall not be granted simply upon request. Unless the petition sets forth good cause for stay or clearly demonstrates that a substantial question is to be presented to the Supreme Court, the motion shall be denied and the mandate thereafter issued forthwith."

If you are court-appointed counsel, your attention is called to the recent amendment to Local Rule 7 which now provides: "Appointed counsel shall, in the event of affirmance or other decisions adverse to the party represented, promptly advise him in writing of his right to seek further review by the filing of a petition for writ of certiorari with the Supreme Court, and shall file such petition, if requested by such party in writing to do so."

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/ Anne G. Parent
Deputy Clerk

enc.

cc: Messrs. Jerry Paul
James V. Rowan
Mr. Donald Ferguson

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-838

FREDERICK PARKER FORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the warrantless search of his truck upon probable cause was unreasonable under the Fourth Amendment and that the district court erred in excluding testimony intended to show that the marihuana found in petitioner's trunk might have been a species other than that specified in the statutory definition of marihuana.

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possessing 10,000 pounds of marihuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1). He was sentenced to four years' imprisonment, to be followed by a two-year special parole term. The court of appeals affirmed *per curiam*.

The evidence showed that on February 14, 1974, a truck rented and driven by petitioner apparently struck and damaged a canopy at the entrance to the Holiday Inn in Homestead, Florida (Tr. 7-9, 20-21). In response to a call from the Inn's manager, a Homestead police officer, Raymond Shuck, arrived at the scene to fill out an accident report (Tr. 20-22). Shortly thereafter, another local police officer, Clinton Terry, arrived to investigate the accident (Tr. 7-8). While Officer Shuck questioned the motel manager and petitioner, Terry went to the truck, which was parked in a public parking lot across the street from the Inn, to estimate the damage (Tr. 8, 22-23). As Terry stood on the hood of his vehicle to see the damage to the top of petitioner's truck, he observed a substantial hole in the truck's roof and several burlap bags covered in plastic, one of which was protruding through the hole (Tr. 9-10, 18). He also detected a strong odor emanating from the truck, which smelled "like a wet grass or weed of some sort," but he was unable at that time to identify the cargo (Tr. 13-14). Continuing his investigation, he reached in and felt the first bag; it appeared to contain some type of grass (Tr. 13).

When Officer Shuck and petitioner came over to the truck, Terry asked Shuck if he knew the nature of the truck's contents (Tr. 24-25). Shuck said petitioner had told him that the truck contained furniture (Tr. 24-25). Terry then asked petitioner about the contents, and he responded, "marijuana" (Tr. 16, 27).[1] Shuck arrested

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[1]At the suppression hearing, Terry testified that petitioner responded to a question which had actually been directed to Officer Shuck (Tr. 16). Petitioner, who did not testify at the hearing, stated at trial that he had said, "[i]t looks like Marijuana to me," in response to a direct question from one of the officers (Tr. 149).

petitioner, advised him of his rights, and placed him in a patrol car that was alongside the truck (Tr. 11, 28). At the officers' request, petitioner gave them his key to the truck; they opened the back of the truck, examined the contents of two bags, and burned a small amount of the substance to determine the odor (Tr. 11-12, 28-30). The officers discovered that the truck contained in excess of 10,000 pounds of marihuana.

1. Petitioner contends (Pet. 6-14) that the search of his truck, though based on probable cause, was unlawful because it was conducted without a warrant. His theory is that the officers could have immobilized the truck until a warrant authorizing the search was obtained. But that immobilization would itself have been a seizure under the Fourth Amendment. This Court held in *Chambers* v. *Maroney*, 399 U.S. 42, that, when a warrantless seizure of a motor vehicle is justified on the basis of probable cause, an immediate warrantless search of the vehicle is also justified (*id.* at 52):

> For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.

The Fourth Circuit's reasoning in *United States* v. *Bradshaw*, 490 F.2d 1097, relied upon by petitioner, is inconsistent with the rationale of *Chambers*, and the case was, in our view, wrongly decided.[2] Although the position we take here was rejected by the Fourth Circuit in *Bradshaw*, the court of appeals wrote no opinion in the present

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[2]The government's petition for a writ of certiorari in *Bradshaw* (No. 73-1809), which presented the issue raised by petitioner here, was denied by this Court on October 21, 1974.

case, and the basis of its decision is therefore unclear.[3] Since we believe that the result reached by the court is correct, and since this Court denied certiorari in *Bradshaw*, we do not urge the Court to grant the present petition on this issue.

2. Petitioner contends (Pet. 15-20) that the district court should have permitted him to present expert testimony that there are three different species of marihuana and that the species of the marihuana seized from him could not be identified. He argues that the evidence fails to establish that the substance he possessed was "marihuana" within the meaning of 21 U.S.C. 802(15), which provides that "[t]he term 'marihuana' means all parts of the plant Cannabis sativa L., whether growing or not * * *."

Every court of appeals that has considered the question, however, has correctly concluded that "Congress intended to prohibit possession of all varieties of marihuana." *United States* v. *Kinney*, 505 F.2d 1354 (C.A. 2). Accord, *United States* v. *Rothberg*, 480 F.2d 534 (C.A. 2), certiorari denied, 414 U.S. 856; *United States* v. *Moore*, 446 F. 2d 448 (C.A. 3), certiorari denied, 406 U.S. 909; *United States* v. *Gaines*, 489 F.2d 690 (C.A. 5); *United States* v. *Burden*, 497 F.2d 385, 387 (C.A. 8) *United States* v. *King*, 485 F.2d 353, 361 (C.A. 10); *United States* v. *Walton*, C.A. D.C., No. 74-1790, decided January 23, 1975.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.

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[3]The district court upheld the search as incident to a lawful arrest (Tr. 60-61).